

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of Verizon Communications Inc. (“Verizon”) and MCI, Inc. (“MCI”) to Transfer Control of MCI’s California Utility Subsidiaries to Verizon, Which Will Occur Indirectly as a Result of Verizon’s Acquisition of MCI.

Application 05-04-020
(Filed April 21, 2005)

**ADMINISTRATIVE LAW JUDGE’S RULING
ADDRESSING APPLICANTS’ MOTION TO COMPEL RESPONSES
BY COX CALIFORNIA TELCOM, LLC**

1. Summary

This ruling grants the motion filed on August 26, 2005, by Verizon Communications Inc. (Verizon) and MCI, Inc. (MCI) (collectively, Applicants) to compel a response to one data request to which Cox California Telcom, LLC (Cox) has limited its response. The data request seeks the Federal Communications Commission (FCC) Form 477 filings since January 1, 2004, for Cox and for the Cox affiliate that provides cable broadband services in California.

2. Factual Background

Applicants served their Third Set of Data Requests on Cox on July 27, 2005. The data requests seek documents related to Cox’s competitive presence in California. The data request at issue here (Data Request 3-12) seeks:

“[A]ll Federal Communications Commission Form 477 filings you have submitted for California since January 1, 2004.”

Cox on August 8, 2005, objected to this and other data requests on the ground that, among other things, the requests “seek information about services

which are not within the jurisdiction of the CPUC.” (Motion, Exhibit B.) The parties met and conferred on August 23 and 24, 2005, and apparently narrowed their differences to only Data Request 3-12. Cox raises two primary objections to this request: (1) the Form 477 filings relate to services outside Commission jurisdiction, and (2) certain of the filings are highly confidential documents within the possession of a Cox affiliate that is not a party to this proceeding.

3. Position of Applicants

Applicants assert that the data request is relevant to the competition issues in this proceeding. They argue that Cox has explicitly stated that the proposed transaction will have a negative impact on competition in California. Cox also has challenged Applicants’ assertion that intermodal competitors such as cable companies will permit California consumers to choose from a large pool of competitive providers in a post-merger world. (Cox Protest, at 3.) Applicants state that they have sought FCC Form 477s from several intervenors in an attempt to show the relative size of cable and wireless operations in the state. Applicants state that only Cox has refused to provide the information.

4. Analysis of Cox’s Arguments

Cox responded to the motion on August 31, 2005. It challenges the relevance of the Form 477 data, arguing that Applicants cannot prepare a market analysis because it has not requested such data from “many other broadband service providers in California,” and that, in any event, similar information may be available from the FCC. These arguments have little merit. That Applicants may need additional information from other sources to establish their contentions does not mean that Cox may withhold information that it has and can readily provide. Whether similar information may be available from the FCC

is irrelevant, since Cox is being asked to provide existing reporting forms and not to perform analyses that could be deemed burdensome.

Cox argues that its response, if any, should be limited to Verizon's service territory pursuant to the parties' prior agreement concerning discovery limitations. (*See* Administrative Law Judge's (ALJ) Ruling Addressing Applicants' Motion to Compel Responses by Cox California Telcom, LLC dated August 5, 2005, at 4.) That prior agreement, however, related to other discovery. There is no assertion that the parties have entered into a similar agreement in this dispute.

Cox also contends that because broadband services are outside the Commission's jurisdiction, Cox cannot be compelled to produce information relating to its affiliate's provision of those services in California. This issue has already been decided in this proceeding in the August 5, 2005 Ruling Addressing Motions of Qwest to Compel Responses. There, Verizon's objection to providing data subject to regulation by the FCC was rejected on grounds that Verizon "took too narrow a view in terms of permitted discovery." The ruling noted that the Commission has "made it clear that, in evaluating a proposed merger," it "can consider issues typically outside of its jurisdiction to the extent they affect California ratepayers." A similar ruling was made on July 27, 2005, in the SBC/AT&T proceeding, finding that the "Commission has previously confirmed its jurisdiction to consider competitive impacts and mitigating measures for a merger under Section 854(b), even where a federally regulated service is involved." (ALJ's Ruling Denying, in Part, Applicants' Motion to Strike Reply Testimony of Various Witnesses.)

Finally, Cox asserts that it should not be required to produce Form 477 filings in the possession of an affiliate that is not a party to this proceeding.

(Opposition of Cox, at 7.) On the contrary, Cox is required to produce documents over which it has possession, custody or control. If Cox in the ordinary course of business can obtain such documents from its affiliates, Cox has control over such documents and they should be produced. (*See, e.g., Camden Iron & Metal, Inc. v. Marubeni America Corporation* (D. N.J. 1991) 138 F.R.D. 438, 441-442 (subsidiary corporation has “control” over parent company’s documents if “[t]here is access to documents when the need arises in the ordinary course of business”); *see also Choice-Intersil Microsystems, Inc. v. Agere Systems, Inc.* (N.D. Cal. 2004) 224 F.R.D. 471, 472-73.)

In fact, the ALJ’s ruling on Applicants’ motion to compel against Qwest already addressed this issue. The ruling stated that “it is clear that California-related information sought from Qwest’s California affiliates and its corporate parent is relevant to this proceeding and should be produced,” while information sought from affiliates that do not operate in California need not be produced absent a further showing of relevance. (*See* ALJ’s Ruling Addressing Applicants’ Motion to Compel Responses, July 29, 2005, at 5.)

5. Discussion

The documents sought by Applicants here are relevant to the issues of whether the Verizon/MCI merger will have a significant competitive impact in the markets for telecommunications and Internet services, as Cox alleges. (Cox Protest, at 14-16.) The question of relevancy is whether the information has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Cal. Evid. Code § 210.) The information sought in this discovery dispute has a tendency to prove or disprove the existence of competition for telecommunications services (*i.e.*, the potential for cable telephony services). The existence or non-existence of competition for

telecommunications services is a fact that is of consequence in this proceeding. The discovery request cannot be said to be unduly burdensome, and Cox has not so alleged. To the extent that Cox is concerned about the confidentiality of its marketing documents and the marketing documents of its affiliates, the data can be made subject to “Lawyers Only” nondisclosure agreements similar to those that apply to Cox’s receipt of Verizon and MCI documents. (*See* ALJ’s Ruling Granting, in Part, Motion for Protective Order, dated July 15, 2005.)

Applicants seek documents concerning Cox’s broadband communications services in California. The Commission has held that the number and strength of competitors remaining in the market after a merger is relevant in determining whether the merger would adversely affect competition. Thus, in the Enova/Pacific Enterprises merger case, the Commission upheld an ALJ’s ruling requiring Southern California Edison Company to produce documents relating to its “current plans in the area of competition,” and ordering sanctions for refusing to provide such documents. (*Re Pacific Enterprises* (1998) 70 CPUC 2d 343.) The ALJ had found that such documents were relevant to analyzing the “competitive environment that will exist subsequent to the consummation of the proposed merger.” The Commission also noted that “[w]hat matters in assessing a merger is how the merger will change the competitive circumstances that would obtain absent the merger.” (70 CPUC 2d at 378.)

Similarly, in the Telesis/SBC merger case, the Commission noted the importance of considering the future plans of potential competitors in the California markets for local exchange or intrastate services. (*Re Pacific Telesis Group* (1997) 71 CPUC 2d 351.) Likewise, in the GTE/Bell Atlantic merger case, the Commission relied on the presence of other actual and potential competitors, and their relative strengths and weaknesses, in finding that the proposed merger

would not adversely affect competition. (*Re GTE Corporation and Bell Atlantic Corporation* (2000) D.00-03-021, at 106.)

The relevance of competitive broadband service information to a merger proceeding is, among other things, that such information may assist the Commission in evaluating the competitive landscape that a combined Verizon/MCI would face and assess whether, within that landscape, the new company would be able to exercise market power.

In summary, Cox in the context of this case and this data request has not provided a convincing rationale as to why it should not be required to produce responsive documents to the extent that it possesses or in the ordinary course of business has access to the responsive documents. Accordingly, Cox is directed to provide responses to modified Data Request 3-12 as specified below.

IT IS RULED that:

1. The Applicants' Joint Motion to Compel Responses by Cox California Telcom, LLC (Cox) to Applicants' Third Set of Data Requests is granted.
2. Parties shall promptly meet and confer as necessary to resolve specific details concerning materials to be produced and the degree of confidentiality, if any, to be accorded such documents.
3. Cox shall produce relevant documents that are responsive to Applicants' Data Request 3-12.
4. Cox's production of documents in response to Applicants' Data Request 3-12 shall be made within three business days of the date of this ruling, unless otherwise mutually agreed by the parties.

Dated September 6, 2005, at San Francisco, California.

/s/ GLEN WALKER

Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Addressing Applicants' Motion to Compel Responses by Cox California Telcom, LLC on all parties of record in this proceeding or their attorneys of record.

Dated September 6, 2005, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.